United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03–2 OF 2001(W)
STEVE SHIM CJ (SABAH & SARAWAK), ABDUL MALEK AHMAD AND MOHTAR ABDULLAH FCJJ
5 APRIL 2002

Limitation *— Enforcement of judgment — Interest on judgment debt — Whether arrears of interest included future interest — Recovery of interest on judgment debt must be made within six years of judgment date and only up to date of act of recovery — Bankruptcy notice issued after limitation of six years, whether invalid — Conflict between O 42 r 12 Rules of the High Court 1980 and s 6(3) Limitation Act 1953, whether latter prevailed — Pre judgment interest, whether statute barred — Limitation Act 1953 s 6(3)*

Words and Phrases *— 'until the judgment is satisfied' — Limitation Act 1953 s 6(3) — Rules of the High Court 1980 O 42 r 12 — Courts of Judicature Act 1964 s 17*

The appellant had obtained summary judgment against the respondent for a sum on the overdraft account together with interest thereon and for a sum on the overdue trust receipt account together with interest thereon until full settlement and costs. Consequently, as no payments were made, the appellant filed a bankruptcy notice against the judgment debtor including accrued interest thereon. The respondent had filed a summons in chambers to set aside the bankruptcy notice, which was dismissed by the learned senior assistant registrar. However, he was successful in his appeal to the judge in chambers who held that the bankruptcy notice was invalid (see [1997] MLJU 325). The appeal by the appellant to the Court of Appeal was heard and dismissed with costs (see [2001] 1 MLJ 561). This court granted leave to the appellant to appeal on the following question: what was the proper construction of s 6(3) of the Limitation Act 1953 ('the Act'), in respect of the second limb, that is, 'No arrears of interest of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due'.

Held, dismissing the appeal:

(1) When an act of recovery is made, future interest could not be said to be in arrear and, therefore, could not be claimed (see p 397D).

(2) The second limb of s 6(3) of the Act provided that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it could not denote interest which was still not due. It must, therefore, mean arrears of interest at the time of recovery and could not include future interest even if the amount due had not been paid (see p 397D–E); *Lowsley & Anor v Forbes (t/a LE Design Services* [1998] 3 All ER 897 followed.

(3) Therefore, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date would only be entitled to that amount and nothing more. If he filed it on the first day after the six year period, his action would be barred by limitation, arrears of interest included (see p 397F).

(4) In the instant case, although the amount of arrears of interest claimed was only for six years from the judgment date, the bankruptcy notice had been filed long after the limitation period of six years. Accordingly, the bankruptcy notice was rendered invalid. As for the prejudgment interest, despite the Court of Appeal's finding on this point, the court held that that was in order as it was merged with the principal amount from the date of the breach, and which was the standard stipulation in all contracts, to become the judgment debt (see p 397F–G).

(5) In view of the wording of the second limb of s 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. There was no formal defect or any irregularity in the instant case and s 131 of the Bankruptcy Act 1967 was certainly not applicable. The only error of the appellant here was to file the bankruptcy notice out of time (see p 398F–H).

(6) The court was aware of O 42 r 12 of the Rules of the High Court 1980 ('the RHC'), which provided that every judgment debt shall carry an interest from the date of judgment until the judgment was satisfied. These rules were made by virtue of s 17 of the Courts of Judicature Act 1964 ('the CJA'). The words 'until the judgment is satisfied' in O 42 r 12 appear to be in conflict with the second limb of s 6(3) of the Act. However, between subsidiary legislation made under the CJA, namely the RHC, if it conflicted with s 6(3) of the Act, which was a parent law, then the Act prevailed in view of s 23 of the Interpretation Acts 1948 and 1967 (see p 398A–D).

[Bahasa Malaysia summary

Perayu telah memperolehi penghakiman terus terhadap responden bagi satu jumlah ke atas akaun overdraf bersama-sama dengan faedah ke atasnya dan untuk satu jumlah ke atas akaun resit amanah yang melebihi tempoh berserta faedah ke atasnya sehingga penjelasan sepenuhnya dan kos. Dengan yang demikian, oleh kerana tiada pembayaran dibuat, perayu telah memfailkan satu notis kebankrapan terhadap penghutang penghakiman termasuk faedah yang terakru ke atasnya. Responden telah memfailkan satu saman dalam kamar untuk mengetepikan notis kebankrapan tersebut, yang telah ditolak oleh penolong kanan pendaftar yang arif. Walau bagaimanapun, beliau

berjaya di dalam rayuannya kepada hakim dalam kamar yang telah memutuskan bahawa notis kebankrapan tersebut adalah tidak sah (lihat [1997] MLJU 325). Rayuan oleh perayu kepada Mahkamah Rayuan telah didengar dan ditolak dengan kos (lihat [2001] 1 MLJ 561). Mahkamah ini telah memberikan kebenaran kepada perayu untuk merayu atas soalan berikut: apakah pentafsiran sebenar s 6(3) Akta Had Masa 1953 ('Akta tersebut'), berhubung dengan bahagian kedua, iaitu, 'Tiada tunggakan faedah bagi mana-mana hutang penghakiman boleh diperolehi kembali selepas luputnya tempoh selama enam tahun dari tarikh pada mana faedah itu menjadi kena dibayar'.

Diputuskan, menolak rayuan tersebut:

(1) Ketika perbuatan untuk mendapatkan kembali dilaksanakan, faedah masa depan tidak boleh diperkatakan sebagai tertunggak dan, dengan itu, tidak boleh dituntut (lihat ms 397D).

(2) Bahagian kedua s 6(3) Akta tersebut memperuntukkan bahawa sesuatu tindakan untuk mendapatkan kembali tunggakan faedah mestilah dimulakan dalam tempoh enam tahun dari tarikh penghakiman dan disebabkan oleh perkataan 'tunggakan', ia tidak boleh menandakan faedah yang masih belum kena dibayar. Ia semestinya, dengan itu, bermakna tunggakan faedah pada waktu mendapatkan semula dan tidak boleh memasukkan faedah masa depan meskipun jika jumlah yang kena dibayar masih belum dibayar (lihat ms 397D–E); *Lowsley & Anor v Forbes (t/a LE Design Services* [1998] 3 All ER 897 diikut.

(3) Oleh itu, seseorang yang memfailkan sesuatu tindakan untuk mendapatkan semula tunggakan faedah pada hari terakhir tempoh enam tahun daripada tarikh penghakiman adalah hanya berhak kepada jumlah itu sahaja dan tidak lebih daripadanya. Jika beliau memfailkannya pada hari pertama selepas tempoh enam tahun itu, tindakan beliau dihalang oleh had masa, termasuk tunggakan faedah (lihat ms 397F).

(4) Dalam kes semasa, meskipun jumlah tunggakan faedah yang dituntut adalah hanya untuk tempoh enam tahun daripada tarikh penghakiman, notis kebankrapan telah difailkan jauh selepas tempoh had masa enam tahun. Sehubungan itu, notis kebankrapan tersebut adalah menjadi tidak sah. Berhubung dengan faedah pra penghakiman, meskipun terdapat keputusan yang dibuat oleh Mahkamah Rayuan mengenai perkara ini, mahkamah memutuskan bahawa faedah pra penghakiman tersebut adalah mengikut aturan kerana ia bercantum dengan jumlah prinsipal daripada tarikh pecah kontrak, dan yang mana merupakan penetapan standard dalam semua kontrak, untuk menjadi hutang penghakiman (lihat ms 397F–G).

(5) Memandangkan perkataan-perkataan dalam bahagian kedua s 6(3) Akta tersebut, perbuatan mendapatkan semula tunggakan

faedah berhubung dengan hutang penghakiman mestilah dibuat dalam tempoh enam tahun dari tarikh penghakiman dan hanya sehingga tarikh tindakan mendapatkan semula itu. Tidak terdapat kecacatan yang formal atau sebarang luar aturan dalam kes semasa dan s 131 Akta Kebankrapan 1967 adalah tidak terpakai. Satu-satunya kesilapan perayu di sini adalah memfailkan notis kebankrapan di luar masa (lihat ms 398F–H).

(6) Mahkamah mengetahui mengenai A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), yang mana memperuntukkan bahawa setiap hutang penghakiman boleh diberi faedah daripada tarikh penghakiman sehingga penghakiman tersebut diselesaikan. Kaedah-kaedah ini dibuat menurut s 17 Akta Mahkamah Kehakiman 1964 ('AMK'). Perkataan-perkaraan 'sehingga penghakiman diselesaikan' di dalam A 42 k 12 nampaknya bercanggahan dengan bahagian kedua s 6(3) Akta tersebut. Walau bagaimanapun, antara perundangan subsidiari yang dibuat di bawah AMK, iaitu KMT 1980, jika ia bercanggahan dengan s 6(3) Akta tersebut, yang mana merupakan undang-undang induk, maka Akta tersebut kekal memandangkan s 23 Akta Pentafsiran 1948 dan 1967 (lihat ms 398A–D).

Notes

For a case on enforcement of judgment, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1824.

Cases referred to

Ernest Cheong Yong Yin, Re; ex p United Malayan Banking Corp Bhd [1997] MLJU 325 (refd)

Lim Ah Hee @ Sim Ah Hee, Re; ex p Perwira Affin Bank Bhd [1997] MLJU 46 (refd)

Lim Ah Hee, Re; ex p Perwira Affin Bank Bhd [2000] 3 MLJ 211 (refd)

Lowsley & Anor v Forbes (t/a LE Design Services [1998] 3 All ER 897 (folld)

Malaysian Soil Investigation Sdn Bhd v EMKO Holdings Sdn Bhd [1994] 1 CLJ 267 (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)

Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (refd)

Yamaha (M) Sdn Bhd, Re [1990] 3 MLJ 317 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 131
Bankruptcy Rules 1969 r 276
Courts of Judicature Act 1964 ss 4, 17

Interpretation Acts 1948 and 1967 s 23
Limitation Act 1939 [Eng] s 2(4)
Limitation Act 1980 [Eng] s 24
Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 46 rr 2(1), 12

Appeal from: Appeal No W–03–50 of 1996 (Court of Appeal, Kuala Lumpur)

Ling Thik Ping (*Asmadi bin Othman* with him) (*Che Mokhtar & Co*) for the appellant.

Phang Chi Ming (*Ong Chee Keong* with him) (*Ong Manickam & Co*) for the respondent.

Abdul Malek Ahmad FCJ (delivering judgment of the court): On 15 October 1987, the appellant had obtained summary judgment against the respondent for RM95,864.93 on the overdraft account together with interest at 15%pa thereon with monthly rests from 1 April 1986 until full realisation, and for RM66,051.74 on the overdue trust receipt account together with interest at 16% pa thereon until full settlement, and RM350 costs. Consequently, as no payments were made, the appellant on 24 January 1996 had filed a bankruptcy notice against the judgment debtor amounting to RM229,563.68 including accrued interest thereon.

For the purposes of this judgment, it is necessary to reproduce the particulars in the bankruptcy notice:

PARTICULARS

(I)	Judgment sum	RM	95,864.93
plus	Interest on RM95.864–93 at 15% per annum with monthly rests from 1–4–86 till 24–1–96 (Interest stops running after 14–10–93)	RM	106.863.04
Less Payment		RM	112,000.00
		RM	90,727.97
(II)	Judgment sum	RM	66,051.74
plus	interest thereon at the rate of 16%pa on the sum of RM60,000 from 1 April 1986 until 24 January 1996 (interest stops running after 14 October 1993)	RM	72,433.97
(III)	Costs	RM	350.00
	Outstanding sum as at 24 January 1996	RM	229,563.68

NB Full particulars as per
Statement of Account enclosed

The respondent had filed a summons in chambers to set aside the bankruptcy notice which was dismissed by the learned senior assistant registrar ('the SAR'). However, he was successful in his appeal to the judge in chambers who on 25 June 1996 held that the bankruptcy notice was invalid. The appeal by the appellant to the Court of Appeal filed on 22 July 1996 was heard on 23 and 24 February 1998 and was dismissed with costs almost three years later on 10 February 2001. It is somewhat disturbing to note that the appeal took four years and seven months to be disposed of in the Court of Appeal.

At one glance, it is apparent to us that the learned SAR was correct in holding that the bankruptcy notice was valid, and both the High Court and the Court of Appeal were wrong in holding otherwise, as the particulars in the bankruptcy notice specifically limited the interest claimed up to 14 October 1993 which is exactly six years from the date the summary judgment was granted.

On 25 April 2001, this court granted leave to the appellant to appeal on the following question:

> What is the proper construction of s 6(3) of the Limitation Act 1953 ('the Act'), in respect of the second limb, that is, 'No arrears of interest of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due'?

It is relevant to restate s 6(3) of the Act at this point:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

In *Re Ernest Cheong Yong Yin; ex p United Malayan Banking Corp Bhd* [1997] MLJU 325, at pp 21–22, the learned High Court judge concluded his judgment in the following manner:

> I hold that the claim of interest at the rate of interest as agreed to by the parties commencing from the date of default would be time barred by virtue of s 6(3) of Act 254 if claimed six years after the date of commencement. The judgment creditor would however be entitled to claim the 8% per annum on the judgment debt commencing from the date of judgment until the date of realisation as this is a mandatory provision. This would be the proper interpretation bearing in mind that, in as much as a judgment creditor who chooses to sit on his judgment must suffer the consequence of the period of limitation working against him, judgment debtors also cannot take their own sweet time to pay the judgment debt. Hence where the action for recovery is taken within the limitation period the judgment creditor would be entitled to the higher agreed rate of interest but if he only takes action to recover the debt after six years he would only be allowed the maximum rate of 8% per annum on the principal sum due.

> I would therefore agree with the learned judge in *Malaysian Soil Investigation Sdn Bhd v EMKO Holdings Sdn Bhd* [1994] 1 CLJ 627 to this extent. I therefore allowed the appeal and set aside the order of the learned SAR dated 26 April 96 as the act of recovery, ie the issuance of the BN on 24 January 96 was well past the date when limitation had set in. I had earlier indicated that I would deal with s 131 in the later part of my judgment. As the issue on the amount of interest claimable is one of great import, I am of the view that s 131 cannot be used to cure the defect which goes to the root of the BN. UMBC is therefore not entitled to recover the interest sums of RM106,863.04 and RM72,433.97. As such the BN is invalid and has to be struck out.

In the Court of Appeal, the argument was that the bankruptcy notice should be struck out as the amount of interest claimed was excessive as it included a sum which was time barred. That court held that the bankruptcy notice was bad as the amount of interest claimed commenced from 1 April 1986 which included a period of 18 months prior to the judgment on 15 October 1987.

As Abu Mansor Ali JCA (as he then was) wrote in his separate judgment at p 564 (see *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561):

> The respondent argued strongly that if the appellant says that the date the interest became was due on 1 April 1986, as claimed by him then the respondent submitted, if at all the appellant is entitled to claim interest it would be clearly six years from 1 April 1986 which falls on 31 March 1992. The respondent emphasized further that if the Bankruptcy Notice was to be filed interest could only be claimed up to 31 March 1992. Therefore the respondent submitted that since the Bankruptcy Notice was filed out of time on 24 January 1996 no interest could be claimed at all …
>
> After hearing and considering the submissions of both counsels I uphold the substantial submission of the respondent's counsel that the Bankruptcy Notice in this appeal had as not only having included interest prior to the judgment but also the claim of interest was after the six years period barred by s 3 (6(3) sic) of the Limitation Act 1953…
>
> It was clear to me that the material words of s 6 is the judgment and the arrears of interest is the arrears of judgment debt, still referring to the judgment debt. That being my decision I confirm the Judicial Commissioner had not erred in his decision and I dismiss this appeal with costs.'.

Before us, learned counsel for the appellant argued that the Court of Appeal was wrong in law in deciding that the appellant was not entitled to recover any part of the interest of the relevant judgment on 15 October 1987 and in affirming the High Court decision on 25 June 1996 allowing the respondent's application to set aside the appellant's bankruptcy notice.

It was his contention that the proper interpretation of the relevant provision is that if any act of recovery is taken after six years from the time it became due, adding that normally that date is the date of the judgment, then all arrears of interest after that date cannot be claimed. However, all arrears of interest prior to that date is claimable.

To support his argument, he referred to a number of cases and we think it appropriate to deal with some of these authorities at this juncture.

In *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508, a judgment debtor sought to impugn a bankruptcy notice on a number of grounds. Among these, it was contended that the proceedings in bankruptcy had been commenced more than six years after judgment had been recovered without the leave of the court as required under O 46 r 2(1) of the Rules of the High Court 1980 ('the RHC'). It was contended for the judgment creditor that as r 276 of the Bankruptcy Rules 1969 ('the Bankruptcy Rules') excluded the application of the RHC to bankruptcy proceedings, no such leave was required. The second point taken for the judgment debtor was that the bankruptcy notice included interest not recoverable under s 6(3) of the Act which provided that no arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six years from the date on which the interest became due. It was also submitted that the bankruptcy notice included penal interest. The third point taken for the judgment debtor was that the schedule to the bankruptcy notice did not specify the exact amount of the interest due.

In dismissing the judgment debtor's application, it was held that with regard to the contention regarding r 276 of the Bankruptcy Rules, the overriding consideration was the proper interpretation of s 3(1)(i) of the Bankruptcy Act 1967 ('the Bankruptcy Act') regarding the commission of an act of bankruptcy by reason of not complying with a bankruptcy notice. The court was not at liberty to brush aside the explicit provisions of s 3(1)(i) of the Bankruptcy Act merely because of r 276 of the Bankruptcy Rules. Accordingly, if there was any conflict between those two provisions, the court would regard s 3(1)(i) of the Bankruptcy Act as having overriding effect since it ranked as principal legislation whereas the Bankruptcy Rules are subsidiary legislation.

As regards the question of interest, Edgar Joseph Jr J (as he then was) said:

> In the present case, I have already mentioned in the opening paragraph of this judgment that the judgment debt was dated 13 May 1982, and the bankruptcy notice upon which it was grounded was issued on 12 May 1988. This would be within the six year time limit imposed by O 46 r 2(1). There was, therefore, no need for leave to issue execution against the judgment debtor at the time of the issue of the bankruptcy notice and so this ground of objection fails.
>
> The second point taken on behalf of the judgment debtor was that the bankruptcy notice includes interest not recoverable under the second limb of s 6(3) of the Limitation Act 1953, which provides that 'no arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six years from the date on which the interest became due'. A perusal of the judgment upon which the bankruptcy notice was grounded shows that it provides for the payment of interest on the judgment debt 'at the rate of 8% pa calculated from 12 March 1982 to date of payment or realization'. The bankruptcy notice was, as I have already noted, issued on 12 May 1988 and served on the debtor on 9 June 1988.

A It therefore does include an element of interest recovery which is barred by s 6(3) of the Limitation Act 1953, namely, a trifling sum of interest in respect of a period of just two months. Accordingly, the sum specified in the bankruptcy notice as being due by way of interest exceeds the amount actually due.

However, our Act by proviso (ii) to s 3(2) reads as follows:

B

> Provided that a bankruptcy notice…
>
> (ii) shall not be invalidated by reasons only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake;…

C

In any event, I am of the view that having regard to the particular circumstances of this case, the defect in the bankruptcy notice was a mere irregularity which had caused no substantial injustice and so can and should be condoned under s 131 of our Act. (See *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233).

D

In *Re Yamaha (M) Sdn Bhd* [1990] 3 MLJ 317 dated 2 February 1990, a contributory of the wound up company namely Sucaba Holdings had contended that no arrears of interest could be claimed for the period prior to 18 April 1981, being the date six years prior to the date of the filing of the motion by Indian Overseas Bank appealing to the court against the rejection

E of their proof of debt against the company by the liquidator, as the claim was barred by limitation, relying on s 6(3) of the Act.

It was held by the High Court that in calculating when time began to run for the purpose of limitation, what was more important was the date when judgment was entered as it was from that date that time started to run.

F Since the judgment was obtained on 19 May 1978, the six year limitation period as far as enforcement of arrears of interest was concerned commenced from that date. The appeal by Sucaba Holdings against that decision vide SCCA 02–59–90 against Indian Overseas Bank & Anor was withdrawn on 11 November 1991.

G In *Malaysian Soil Investigation Sdn Bhd v EMKO Holdings Sdn Bhd* [1994] 1 CLJ 267, the issue was dealt with in the following manner:

> It is also appropriate at this juncture, in view of the submission of interest not being repayable after the limitation period of six years, to discuss s 6(3) of the Limitation Act which reads:
>
> H 'An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and *no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.*' (Emphasis added.)

I At first reading, the underlined second limb seems to create the impression that arrears of interest in respect of any judgment debt cannot be repayable after the expiration of six years from the date the interest became due meaning that they can only be paid for the six years after becoming due, which is the basis of learned Counsel for the respondent's contention, but actually this is

> an erroneous impression and the correct interpretation should be that one cannot take action to recover the arrears of interest AFTER six years had lapsed from the time they became due. The crucial word in the second limb is therefore 'after' to denote that any act of recovery of the arrears of interest must be before the limitation period of six years had expired and 'recovered' should mean 'claimed' and cannot be held to mean 'repayable'. In the instant case, the judgment was about two years and three months after it became due and was therefore well within the limitation period. The interpretation given on the erroneous impression would create a mockery of sorts as all judgment debtors would take their own sweet time to pay the judgment debt when in actual fact the purpose of interest is to speed up and not to delay payments.
>
> It is abundantly clear that in the notice, the petitioner had calculated the interest due until the date of the notice itself with further interest at the same rate the day after full settlement and the essence of the matter in both the judgment and the notice, like in all court judgments, is that interest continues to be due until full payment is made. The Act certainly does not prohibit the payment of the arrears of interest due on the judgment debt beyond the six years after they become due as long as the act of recovery is made before the expiry of the prescribed six years.

This was followed in *Re Lim Ah Hee @ Sim Ah Hee; ex p Perwira Affin Bank Bhd* [1997] MLJU 46 where the objection was that the interest incorporated in the bankruptcy notice was statute-barred and therefore the bankruptcy notice was void ab initio pursuant to s 6(3) of the Act. It was held that the Act does not prohibit that payment of arrears of interest due on a judgment debt beyond the six years after they become due so long as the act of recovery is made before the expiry of the six year period.

However, an appeal in *Re Lim Ah Hee & Sim Ah Hee; ex p Perwira Affin Bank Bhd* [2000] MLJ 211, the Court of Appeal held at p 217 as follows:

> The learned judge made his ruling only in respect of the second limb whereby he decided that there is no limitation to interest claimed because of the decision in *WT Lamb & Sons v Rider* (1948) 2 KB 331. Since *WT Lamb* had been overruled by *Lowsley*'s case under the law as it is now, a judgment creditor can only claim interest on a judgment sum not exceeding six years from the date it is due. In the present case, the respondent is only entitled to claim interest six years from the date of judgment.

Actually, the reasoning of the Court of Appeal is not quite right as at the High Court, reliance was made on *WT Lamb* not as regards the limitation period in s 6(3) of the Act, which was then similar to s 2(4) of the Limitation Act 1939 in England, within which arrears of interest are recoverable, but more on the word 'action' as to whether 'the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it and the two conceptions have been the subject of different treatment' as propounded in *WT Lamb*'s case.

Accordingly, the High Court in *Lim Ah Hee*'s case had said:

> As seems clear to me that 'action' under s 6(3) of the Act does not cover execution proceedings and what more the bankruptcy actions, it follows therefore that the bankruptcy actions do not come within the ambit of s 6(3) of the Act and is therefore not applicable.

> As s 6(3) of the Act refers to 'actions on judgments' it would seem only sensible to interpret both limbs as applying in the same way, that is, confining to actions on judgments and excluding execution proceedings including bankruptcy actions. In my view the bankruptcy actions just like execution proceedings is the taking of a further step in an existing action rather than the commencement of a new action. In other words the bankruptcy actions do not operate on the concept of the cause of actions as is intended by the provisions of the Act.
>
> However, assuming that I am wrong, and that there are separate rules for the principal sum and for the interest on the principal sum then I need to consider, the interpretation to be given to the second limb of s 6(3) of the Act.

The learned High Court judge then went on to consider the second limb of s 6(3) of the Act and in fact followed, as stated earlier, the *Malaysian Soil Investigation*'s case.

Of course both the *Lim Ah Hee*'s case and the *Malaysian Soil Investigation*'s case were heard in the High Court before *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 was decided. To say that *Lowsley*'s case overruled *Lamb*'s case is also not right as the headnote merely states that *Lamb*'s case was considered. As for the word 'action', the House of Lords held that on a true construction of that word in the relevant law, it must mean a fresh action and did not include proceedings by way of execution. Accordingly, the section did not bar execution of a judgment after six years but only barred the bringing of a fresh action on the judgment.

At the time of *Lowsley*'s case, the relevant provision in England was s 24 of the Limitation Act 1980 which states:

> (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
>
> (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

Lord Lloyd of Berwick began his judgment by saying:

> The first question is whether s 24(1) bars execution of a judgment after six years, or whether it only bars the bringing of a fresh action on the judgment. If the answer is, as the plaintiffs contend, that it only bars a fresh action, the second question is whether, when a judgment is executed after six years, interest on the judgment is limited under s 24(2) to a period of six years before the date of execution. Tuckey J answered the first question in favour of the plaintiffs, and the second question in favour of the defendant. The Court of Appeal agreed with the judge on the first question but disagreed on the second.

Accordingly, in a well researched and well reasoned judgment, the House of Lords dealt with the two questions as follows:

> For all these reasons I would hold that the first question must be answered in favour of the plaintiffs. 'Action' in s 24(1) means a fresh action, and does not include proceedings by way of execution. It is unfortunate that the decisive point in the case did not emerge until the very end of the hearing. But having considered the point in the light of Mr Hockman's written submissions, I am

not left in any doubt as to the correct answer. I would therefore uphold the Court of Appeal on the first point, albeit for different reasons.

With regret, however, I cannot agree with the Court of Appeal on the second question. There would seem to be no reason why the relevant words in s 24(2) 'no arrears of interest…shall be recovered' should not be given their ordinary meaning, so as to bar execution after six years in respect of all judgments. It is what the words say. 'Recovered' has a broad meaning. It is not confined to recovery by fresh action.

But the Court of Appeal has held that the limitation to six years' interest on judgments applies only in a case of actions on judgments, and not to execution of judgments generally. In support of this construction, the Court of Appeal relied strongly on the fact that sub-ss (1) and (2) were part of the same sentence, joined only by a comma, when they were enacted as s 2(4) of the 1939 Act. If the first half of the sentence is confined to actions on judgments, Parliament must have intended that the second half of the sentence should be similarly confined. But in my view this does not follow as a matter of language. 'Any judgment' in the first half of the sentence means, quite literally, any judgment. There is no warrant for limiting 'interest in respect of any judgment debt' in the second half of the sentence to interest in respect of a judgment in an action on a judgment, even if one could think of any good reason why Parliament should so have provided.

Nor is the Court of Appeal's reasoning supported by the legislative history. If it is legitimate to go back to the 1939 Act in order to construe s 24(2) of the 1980 Act, then it is equally legitimate to go back to the 1833 Act, where, as has already been seen, the provisions which are now contained in s 24(1) and (2) were in separate sections, namely ss 40 and 42. Section 42 was a freestanding provision which limited the recovery of interest to a period of six years from when it became due. The provision was later applied to judgment debts carrying interest under s 17 of the Judgment Acts 1838.

So as to the second question I prefer the decision of Tuckey J, who held that s 24(2) limits recovery by way of execution on all judgments to a period of six years, including the judgment in this case. This makes it necessary to consider a third question, which did not arise for decision in the Court of Appeal. In the event of the plaintiffs failing on either of the two main issues, they argued that the time limit should be extended by virtue of s 32(1) of the 1980 Act. That subsection provides:

> 'Subject to sub-s (3) below, where in the case of any action for which a period of limitation is prescribed by this Act, either — (a) the action is based upon the fraud of the defendant; or (b) any fact relevant to the plaintiffs right of action has been deliberately concealed from him by the defendant; or (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.'

The plaintiffs assert that a fact relevant to their right to recover interest was fraudulently or deliberately concealed by the defendant, that fact being his own whereabouts, and the whereabouts of his assets. Tuckey J dealt with the point as follows:

> 'But on my reading of s 32 this point does not get started because s 32 only applies to 'a period of limitation prescribed' for 'any action'. The recovery of interest on a judgment debt is not in my judgment an action.

I think the terms of the section make this plain so s 32 does not apply to s 24(2) and therefore the application which is now made to me does not get off the ground.'

I agree with Tuckey J. I find great difficulty in applying the language of s 32 to the time limit prescribed by s 24(2). The recovery of interest by way of execution on a judgment is not a 'right of action' within the meaning of s 32(1)(b). Even if it were, I doubt whether the defendant's concealment of himself or his assets would be the concealment of a fact relevant to such a right of action.

On the second question therefore I would allow the appeal and restore the judgment of Tuckey J. But on the first question, on which Tuckey J and the Court of Appeal were in agreement, I would dismiss the appeal.

Having studied *Lowsley*'s case carefully, we are persuaded to review the finding in the *Malaysian Soil*'s case as regards the maximum period arrears of interest can be claimed. It was decided then that the interest can go on for more than six years from the judgment date but having reconsidered the matter in the light of *Lowsley*'s case and the word 'arrears', it is now our opinion that when the act of recovery is made, future interest cannot be said to be in arrear and, therefore, cannot be claimed. The decision in the *Malaysian Soil*'s case would have been correct if the words used were 'no interest' and not 'no arrears of interest'.

On these considerations, we would hold that it is obvious that the second limb of s 6(3) of the Act provides that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it cannot denote interest which is still not due. It must, therefore, mean arrears of interest at the time of recovery and cannot include future interest even if the amount due has not been paid. We would, therefore, agree with the finding in *Lowsley*'s case.

Thus, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date is only entitled to that amount and nothing more. If he files it on the first day after the six year period, his action is barred by limitation, arrears of interest included.

In the instant case, although the amount of arrears of interest claimed is only for six years from the judgment date, the bankruptcy notice had been filed on 24 January 1996, long after the limitation period of six years which expired on 14 October 1993. Accordingly, the bankruptcy notice is rendered invalid. As for the prejudgment interest, despite the Court of Appeal's finding on this point, we hold that that is in order as it is merged with the principal amount from the date of the breach, and which is the standard stipulation in all contracts, to become the judgment debt.

In effect, therefore, it is our finding that the bankruptcy notice is in order as regards the amount claimed and the arrears of interest calculated in line with s 3(1)(i) of the Bankruptcy Act which states that a debtor commits an act of bankruptcy if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him a bankruptcy notice under the said Act requiring him to pay the judgment debt with interest quantified up to the date of the bankruptcy notice.

We are aware of O 42 r 12 of the RHC which provides that every judgment debt shall carry interest at the rate of 8% pa or at such other rate not exceeding the rate aforesaid as the court directs unless the rate has been otherwise agreed upon between the parties, such interest to be calculated from the date of judgment until the judgment is satisfied.

These rules were made by virtue of s 17 of the Courts of Judicature Act 1964 ('the CJA') and the words 'until the judgment is satisfied' in the said O 42 r 12 of the RHC appear to be in conflict with the second limb of s 6(3) of the Act in that the former states that interest will go on until full realization whereas the latter indicates that it is up to a maximum period of six years from the judgment date.

Section 4 of the CJA provides that in the event of any inconsistency or conflict between that Act and any other written law other than the Constitution in force at the commencement of that Act, the provisions of that Act shall prevail and, therefore, if there is a conflict between the CJA and the Act, the CJA prevails. However, between subsidiary legislation made under the CJA, namely the RHC, if it conflicts with s 6(3) of the Act, which is a parent law, then the Act prevails in view of s 23 of the Interpretation Acts 1948 and 1967 which reads as follows:

> (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.
>
> (2) In this section 'Act' includes a federal law styling itself an Ordinance or Enactment.

The Court of Appeal had decided that 'the date on which the interest became due' was the date of the breach which would be before the judgment date. We are of the considered view that this finding is erroneous as the arrears of interest are in respect of a judgment debt, which as we have stated earlier is the principal sum and the prejudgment interest, and so the date on which the interest on the judgment debt became due must surely mean the judgment date.

To answer the question posed, we would recapitulate by saying that in view of the wording of the second limb of s 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. In our view, there is no formal defect or any irregularity in the instant case and s 131 of the Bankruptcy Act is certainly not applicable. The only error of the appellant here was to file the bankruptcy notice out of time.

We would, therefore, dismiss the appeal with costs. The deposit will go to the respondent to account of their taxed costs.

Appeal dismissed.

Reported by Peter Ling